Supreme Court, U.S.
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NO. 86-731

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

FRANK MINGO, ET AL, individually and on behalf of all others similarly situated,

APPELLANTS

VERSUS

NEWTON JAMES, ET AL.,

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OPPOSING MOTION TO AFFIRM

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The appellees, in their Motion to Affirm, indicate that the McComb City Charter was amended only in 1908 and 1962. (Motion to Affirm, p. 2). However, the appellees over-

look several important facts contained in the record.[1] The appellees failed

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[1]The parties entered into a Stipulation of Facts prior to trial which is contained in the record. Stipulation of Facts 9 and 10 provide as follows:

> 9. That when the City of McComb, Mississippi returned to its special charter form of government on the first Monday of January, 1947, the City's charter provided that there shall be six selectmen, three elected from the City by the voters voting in an election at-large and three selectmen elected from wards, and the three selectmen elected from wards must reside in the wards from which they are elected.
>
> 10. (Provided same as Stipulation 9, adding that the City was divided into three wards from 1947 until 1962.

Stipulation 15 provided that after the Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975)(three-judge court) decision, the City returned to the method of electing selectmen used from 1947 until 1962.

to list the fact that the City of McComb's charter provided in 1947 that there shall be six selectmen, with three selectmen elected at-large and three selectmen elected from wards. It is this fact which gives rise to the substantial question presented by this appeal.

Appellees argue that the City's charter authorized the City to adopt the October, 1985 change in the method of electing selectmen by ordinance rather than a charter change. (Motion to Affirm, pp. 5-8). They make this argument by relying on sound precedent that once the at-large method of election had been held unconstitutional, the City could not enforce the at-large method of election. (Motion to Affirm, pp. 7-8).

However, the appellees did not address the effect of their voluntary change in the method of election on the City's charter. And, the three-judge panel below did not address this issue. When the appellees in 1976, in response to Setwart v. Waller, supra, reverted to the 1947 charter method of election of three selectmen by wards and three selectmen, the appellees de facto amended the charter.[2]

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[2]This was a de facto change because the city did not formally amend its charter, and the change was not actually implemented by a court. See McDaniel v. Sanchez, 452 U.S. 130, 141, 145-146); County Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (D.D.C. 1983)(three-judge court).

The appellees state that the issue before this Court is what effect did the Stewart v. Waller, supra, decision have on McComb's private charter. However, appellants raised the issue in the Court below and in this Court as to what effect did the appellees' actions in changing the method of election, without formally amending the charter and without obtaining preclearance, in 1976 have on the city's charter. And, appellants raised the question of what effect did the October, 1985 change in method of election have on the 1976 de facto charter change. Neither the Court below, or the appellees, have addressed these issues.

The appellees contend that the method of adopting the five ward plan by ordinance was precleared by the United States Attorney General. (Motion to Affirm, pp. 9-11). Appellees rely on the fact that the Attorney General, in a request for additional information, requested that the appellees provide "evidence of the City's authority from the state to avoid this proivision," (of complying with Section 21-17-9, Miss. Code Ann. (1972). (Motion to Affirm, p.10). The appellees, as stated in their Motion to Affirm, p. 4, in response to the request for additional information sent the United States Attorney General two opinions of the Mississippi Attorney General that the city's charter did not have to

be amended in October, 1985 because the charter, excised of the at-large election clause, provided that the city may elect six selectmen, and divide the city into not less than three wards. (Motion to Affirm, pp. 2, 4) (emphasis added). The Mississippi Attorney General interpreted the effects of the city's action in response to Stewart v. Waller, supra, the same way that the city is interpreting the decision. That is, the State Attorney General construed the city's response as being a Court-Ordered response in 1976, and that the city needed only to excise the unconstitutional at-large language from their charter in order to have an effective charter. (Exhibits G-11 and G-12). However, the appellants

contended (and still contend) that when the city reverted to the 1947 charter method of election it de facto amended the charter. This de facto charter amendment took place in 1976. From 1976 until 1985, the city's charter provided that there shall be six selectmen, three elected from wards and three elected at-large. When the city in October, 1985, by ordinance, changed the method of election of selectmen to five by ward and one at-large, it in fact amended the de facto amended charter of 1976. This voting change was never submitted to the Attorney General for proper Section 5 scrutiny.[2] As this

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[2]The appellees admit that the voting change argued by appellants was never submitted for Section 5 scrutiny. (Motion to Affirm, p. 11).

Court has recognized:

> More recently we stated: 'While the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change; the purpose of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him. (citations omitted).

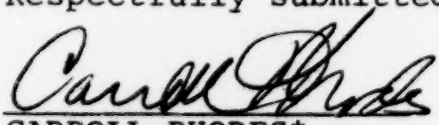
McCain v. Lybrand, ___ U.S.___, 104 S. Ct. 1046 (1984).

Contrary to appellees assertions, the question presented on this appeal is substantial. This question affects every jurisduction covered by the provisions of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c.

CONCLUSION

For the above-stated reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction, and set a briefing schedule and argument before the Court.

Respectfully submitted,



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